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THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RODNEY M. TOOTHACRE, Plaintiff, v. UNITED STATES OF AMERICA, THE INTERNAL REVENUE SERVICE Defendant.	)	Case No. 07-cv-2289-DMS-WMC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS**

The United States of America ("United States"), by and through its undersigned counsel, hereby submits this Memorandum of Points and Authorities in Support of the United States' Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectively, and it respectfully shows the following:

BACKGROUND

Plaintiff's Complaint seeks damages pursuant to 26 U.S.C. §§ 7432, 7433 related to federal tax liens filed by the IRS for outstanding employment tax liabilities for the fourth quarter of 1991 and the first quarter of 1992 and for outstanding income tax liabilities for the tax years 1993 and 1994.[1] With respect to the 1991 and 1992 employment tax liabilities, the IRS filed Notices of Federal Tax Lien on December 22, 2005, and on January 3, 2006. See Martinez Declaration, ¶¶ 2–3; Ex. A & B. The collection statute of limitations expired on January 28, 2006, for the 1991 liabilities, and on April 22, 2006, for the 1992 liabilities. See Martinez Declaration, ¶¶ 4–5; Ex. C & D. Accordingly, the IRS subsequently zeroed out these accounts. See Martinez Declaration, ¶¶ 4–5; Ex. C & D. Subsequently, on February 27, 2008, the IRS filed Certificates of Release of Federal Tax Liens for these liabilities. See Martinez Declaration, ¶ 15, Ex. M.

With respect to the 1993 and 1994 income tax liabilities, the IRS filed a Notice of Federal Tax Lien on February 4, 1997. See Martinez Declaration, ¶ 6; Ex. F. When the statute of limitations purportedly expired on June 1, 2005 and July 6, 2005, these liens "self-released." Believing that the statute of limitations had indeed expired, the IRS filed a Certificate of Release on August 22, 2005, with respect to the 1993 and 1994 income tax liabilities. See Martinez Declaration, ¶ 8; Ex. F. However, in late 2005 the IRS became aware of the fact that Plaintiff's bankruptcy and collection due process proceedings had tolled the statute of limitations and that it had not expired. Because the collection period was still open on these tax periods, the IRS determined that the previously filed Certificate of Release was improper. Accordingly, the IRS filed new Notices of Federal Tax Liens on December 5, 2005 and December 16, 2005 for the 1993 and 1994 income tax liabilities. See Martinez Declaration, ¶¶ 8–9; Ex. G & H. With respect to the Certificate of Release that was erroneously filed on August 22, 2005, the IRS filed two Revocations of Certificate of Release of Federal Tax Lien ("Revocation") on December 16, 2005. See Martinez Declaration, ¶ 10; Ex. I.

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[1]Originally, the Complaint also contained a claim for a temporary restraining order. By stipulation of the parties, this claim was dismissed with prejudice on February 26, 2008.

However, because the Revocations were not filed in accordance with 26 U.S.C. § 6325(f)(2), they were not immediately effective. Section 6325 requires the IRS to send notice of a revocation to the taxpayer and provides that the reinstated lien will not be effective until the date such notice is mailed. 26 U.S.C. § 6325(f)(2). Plaintiff received notice under section 6325 on January 30, 2006, after the new Notices of Federal Tax Lien had been filed on December 5, 2005 and December 15, 2005. Accordingly, the IRS withdrew the two Revocations on January 8, 2008, and January 15, 2008. See Martinez Declaration, ¶ 11–12; Ex. J & K.

On April 6, 2006, Plaintiff submitted to the IRS a document entitled "Notice of Intent to Sue the United States of America," which contained a statement of his intent to sue for damages for failure to release a lien under 26 U.S.C. § 7432. See Martinez Declaration, ¶ 13, Ex. L. The document demanded that the tax liens at issue in this matter be released, but it did not specify any actual, direct economic damages caused by any alleged failure to release a lien on the part of the IRS. See Martinez Declaration, ¶ 13, Ex. L. On May 16, 2006, Plaintiff submitted to the IRS a document entitled "Amendment to Notice of Intent to Sue the United States of America," in which Plaintiff demanded five million dollars in damages. See Martinez Declaration, ¶ 13, Ex. L. The document contained no further details of the basis for that figure or the nature of the damages suffered. See Martinez Declaration, ¶ 13, Ex. L.

On May 22, 2006, after receiving Plaintiff's Amendment to Notice of Intent to Sue the United States of America, the IRS contacted Plaintiff and requested that he provide the IRS with a detailed description of the damages. See Martinez Declaration, ¶ 14. The requested documentation was never received. See Martinez Declaration, ¶ 14. Subsequently, on November 7, 2007, the IRS denied Plaintiff's claim. See Martinez Declaration, ¶ 15.

On December 6, 2008, Plaintiff filed a Complaint in the above-captioned matter against the United States of America and the IRS[2] seeking damages under 26 U.S.C. §§ 7432, 7433[3] in the amount of $100,000.00 plus fees and costs. Compl. ¶ 1. Plaintiff contends that he suffered damages because the existence of federal tax liens for income tax liabilities for the tax years 1993 and 1994, and the employment tax liabilities for the tax years 1991 and 1992, delayed the refinancing of his home. Compl. ¶ 5.

ARGUMENT

A. Legal Standards.

Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss an action for lack of subject matter jurisdiction. On such a motion, the plaintiff bears the burden of establishing that subject matter jurisdiction exists. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The United States, as sovereign, may not be sued without its consent, and the terms of its consent define the court's jurisdiction to hear the suit. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941). Any waiver of this sovereign immunity must be unequivocally expressed and cannot be implied. Mitchell, 455 U.S. at 538. If sovereign immunity has not been waived, the suit must be dismissed. Hutchinson, 677 F.2d at 1327. Statutory waivers of sovereign immunity are to be strictly construed against such surrender, Safeway Portland Employees' Fed. Credit Union v. FDIC, 506 F.2d 1213, 1216 (9th Cir. 1974), and any suit that is brought must be in strict compliance with the terms of the statute, Sherwood, 312 U.S. at 590. The plaintiff bears the burden of

[2]The IRS is not an entity that is subject to suit. E.g., Blackmar v. Guerre, 342 U.S. 512, 514 (1952); Murphy v. United States, et al., 493 F.3d 170, 173 (D.C. Cir. 2007). Therefore, the IRS should be dismissed as a party and the United States should be substituted as the only proper federal Government Defendant.

[3]Although Plaintiff cites to 26 U.S.C. § 7432 in his Complaint, he does not address this claim and repeatedly states that he seeks damages pursuant to 26 U.S.C. § 7433. Compl. ¶ 1, 3. Because it is not clear pursuant to which provision Plaintiff brings his claim for damages, the United States will address both sections.

demonstrating that sovereign immunity has been waived by the United States. Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983).

Under Rule 12(b)(6), a defendant may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Dismissal is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. See Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999). All allegations in the complaint are to be viewed in the light most favorable to the non-moving party and all material allegations must be accepted as true. See id.; Am. Family Ass'n v. City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). Dismissal is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. However, in order to "[p]revent [ ] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . . documents upon which their claims are based, a court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007) (internal citations omitted).

B. This Court Lacks Subject Matter Jurisdiction over Plaintiff's Claims for Damages under 26 U.S.C. §§ 7432, 7433 Because Plaintiff Failed to Exhaust His Administrative Remedies.

Plaintiff asserts claims for damages under 26 U.S.C. § 7432 for failure to release a tax lien and under 26 U.S.C. § 7433 for unauthorized tax collection activities.[4] Compl. ¶¶ 1, 2, 6. Both Tax Code provisions require a plaintiff to exhaust administrative remedies before filing a civil suit. See 26 U.S.C. §§ 7432(d), 7433(d). Failure to exhaust deprives the court of jurisdiction. Information Resources, Inc. v. United States, 950 F.2d 1122 (5th Cir.1992); see also Soos v. Manella, 78 F.3d 594 (9th Cir. 1996) (unpublished table decision). The treasury regulations specify the administrative remedies that a taxpayer is required to exhaust. Administrative remedies for section 7432 and section 7433 are set forth in Treasury Regulation § 301.7432-1 and § 301.7433-1, respectively. An administrative claim for failure to release a tax lien must include, inter alia, the taxpayer's identifying information, a copy of the notice of lien affecting the property, the grounds for the claim, a description of injuries, and the amount of the claim. See Treas. Reg. § 301.7432-1(f)(2). An administrative claim for unauthorized collection actions also must include, inter alia, the taxpayer's identifying information, the grounds for the claim, a description of injuries, and the amount of the claim. See Treas. Reg. § 301.7433-1(e)(2). The failure to comply with the regulations deprives a court of jurisdiction even where the IRS has received actual notice of the claim. Venen v. United States, 38 F.3d 100, 103 (3d Cir. 1994); Amwest Surety Ins. Co. v. United States, 28 F.3d 690, 696 (7th Cir.1994).

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[4] See supra note 2.

Plaintiff failed to comply with the regulations under sections 7432 and 7433. Plaintiff's April 6, 2006 letter stated his intent to sue for damages under section 7432 and alleged that the federal tax liens had interfered with Plaintiff's pending refinancing, but it did not contain a detailed description of the injuries or the amount of the claim. See Martinez Declaration, Ex. L. The May 16, 2006 amendment contained a blanket claim for damages under section 7432 in the amount of five million dollars, but still lacked a description of the injuries. See Martinez Declaration, Ex. L. Accordingly, the IRS contacted Plaintiff on May 22, 2006, to request a detailed description of the injuries suffered. See Martinez Declaration, ¶ 14. No such documentation was ever received. See Martinez Declaration, ¶ 14.

With respect to his claim under section 7433, Plaintiff failed to submit any claim at all to the IRS. Thus, because Plaintiff failed to comply with the requirements of Treasury Regulation §§ 301.7432-1(f)(2)(v), 301.7433-1(e), this Court lacks subject matter jurisdiction over his claim for damages under sections 7432 and 7433 and must dismiss these claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. See Venen, 38 F.3d at 103; Amwest, 28 F.3d at 696.

D. Even if Plaintiff Had Exhausted His Administrative Remedies, Plaintiff's Claims for Damages under 26 U.S.C. § 7432 Fails to State a Claim Upon Which Relief Can Be Granted.

Alternatively, even if Plaintiff had exhausted his administrative remedies for his claim for damages under 26 U.S.C. § 7432, the Complaint nonetheless fails to state a claim upon which relief can be granted. Under this provision, damages are limited to the "actual, direct economic damages sustained by the plaintiff which, but for the actions of the defendant, would not have been sustained." 26 U.S.C. § 7432. Further, "[i]njuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages." Treas. Reg. § 301-7433-1(c)(1). Although the Complaint alleges that the IRS caused Plaintiff "immense problems" and prays for $100,000.00 in damages, it does not allege how the actions of the IRS were the proximate cause of these damages, the nature of the immense problems, or how the $100,000.00 figure was derived. Because the allegations in the Complaint, even if proven, do not demonstrate that Plaintiff has suffered "actual, direct economic damages" recoverable under section 7432, this Court should dismiss this claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Williamson , 208 F.3d at 1149; Big Bear Lodging Ass'n, 182 F.3d at 1101.

E. Even if Plaintiff Had Exhausted His Administrative Remedies, Plaintiff's Claims for Damages under 26 U.S.C. § 7433 Fails to State a Claim Upon Which Relief Can Be Granted.

Under section 7433, a taxpayer may bring a suit for damages if "any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. § 7433. Under this provision, damages are limited to the "actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee . . . ." 26 U.S.C. § 7433(b). Moreover, "Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages." Treas. Reg. § 301.7433-1(b)(1). Thus, in order to recover damages under section 7433, Plaintiff must plead proper "actual, direct economic damages" sustained as a proximate result of the claimed violation.

Plaintiff failed to allege any actual, direct economic damages sustained as a proximate result of the alleged violations as required by section 7433. Plaintiff alleges that the "illegal actions of the IRS" has "halt[ed] the successful closing of a refinance escrow, causing immense problems for Toothacre" and prays for compensation of $1,000 per day until the liens are removed. Plaintiff did not provide the actual pecuniary basis for this amount, failed to describe the nature of the "immense problems" he suffered, and failed to explain how his injuries were more than mere inconvenience. Thus, dismissal of Plaintiff's claim for damages under section 7433 is appropriate pursuant to Fed. R. Civ. P. 12(b)(6) because it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the Complaint. See Williamson , 208 F.3d at 1149; Big Bear Lodging Ass'n, 182 F.3d at 1101.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The United States also requests that this Court grant any other relief to which it may be entitled.

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DATED this 28th day of February, 2008.

Respectfully submitted,

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